CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~812~~ 79

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THEODORE MICHEL

No. ~~813~~ 80

THE UNITED STATES OF AMERICA, PETITIONER

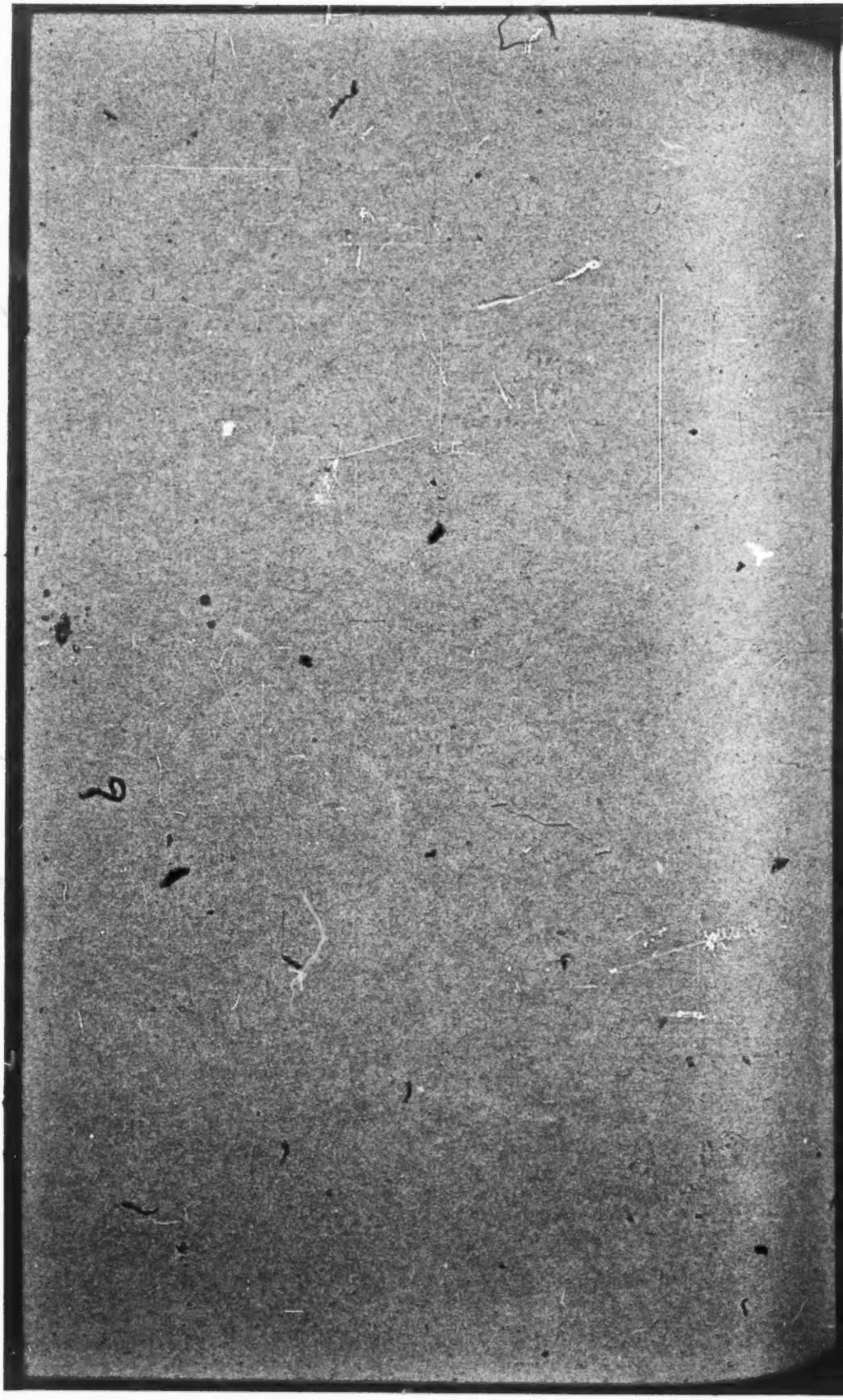
vs.

LOUIS KRIEGER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 12, 1930
CERTIORARI GRANTED MAY 19, 1930

(34943)
(34944)



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 812

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THEODORE MICHEL

No. 813

THE UNITED STATES OF AMERICA, PETITIONER

vs.

LOUIS KRIEGER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In United States District Court, Southern District of New York

THEODORE MICHEL, PLAINTIFF
against
THE UNITED STATES OF AMERICA, DEFENDANT
No. L 43/211

Complaint

Plaintiff, by Donald Horne, his attorney, for his complaint against the United States of America, respectfully shows and alleges:

First. That at all times herein mentioned plaintiff was and now is a citizen of the United States and a resident of the Borough of Manhattan, City of New York, County of New York, State of New York; that during the year 1919, plaintiff was a member of the copartnership of Michel & Krieger, composed of Louis Krieger and Theodore Michel, plaintiff herein, which said copartnership was engaged in the business of manufacturing, converting and dealing in silks, with its principal office and place of business at Number 225 Fifth Avenue, in the Borough of Manhattan, City of New York, County of New York, State of New York.

Second. That during the year 1920, and from April 9, 1917,
2 to August 14, 1921, William H. Edwards was the collector of internal revenue for the second district of New York; that since August 14, 1921, said William H. Edwards has not been in office as collector of internal revenue.

Third. That on March 15, 1920, plaintiff duly filed with said William H. Edwards, as collector of internal revenue, his income tax return for the calendar year 1919, and paid the income tax thereon shown to be due, in four installments, as provided by law, as follows: On march 15, 1920, $5,954.85; on June 15, 1920, $5,954.85; on September 15, 1920, $5,985.85; on December 15, 1920, $5,984.85, a total of $23,819.40.

Fourth. That on or about February 7, 1924, plaintiff filed with the collector of internal revenue for the second district of New York his claim for refund of $23,641.63, stating therein that his income for 1919 had been overstated in the amount of $79,026.57; that said overstatement was due to overvaluation of the closing inventory in the return of income of Michel & Krieger, said copartnership; that on August 17, 1925, the Commissioner of Internal Revenue advised plaintiff by letter that said claim for refund would be rejected, and that this rejection would officially appear on the next schedule to be approved by him; that the Commissioner of Internal Revenue never notified plaintiff that the claim had been rejected, or the date of such rejection, until June 27, 1928; that on said last-mentioned date, the Commissioner of Internal Revenue notified plaintiff by letter that he had rejected the claim on September 2, 1925.

Fifth. That the schedule on which the rejection officially
3 appeared, referred to in the commissioner's letters to plaintiff dated August 17, 1925, and June 27, 1928, was a list of over-assessments, for transmission to the collector of internal revenue, and not furnished to, or available to plaintiff; that plaintiff had no notice that said schedule had been approved by the Commissioner of Internal Revenue until June 27, 1928, and that plaintiff received no notice of the rejection of his claim or the date thereof, until June 27, 1928.

Sixth. That section 3226 of the Revised Statutes of the United States, as amended by section 1014 of the revenue act of 1924, and reenacted without change by section 1113 of the revenue act of 1926, provides that a taxpayer may begin a suit for recovery of internal revenue taxes alleged to have been erroneously or illegally assessed or collected at any time within two years after the disallowance of the part of a claim for refund to which such suit relates, and that the Commissioner of Internal Revenue shall within ninety days after any such disallowance notify the taxpayer thereof by mail; that the Commissioner of Internal Revenue disallowed the part of plaintiff's claim to which this suit relates on September 2, 1925, and did not notify plaintiff thereof by mail or otherwise within ninety days after such disallowance, or until June 27, 1928, more than two years after such disallowance.

Seventh. That in computing the gross income of the partnership of Michel & Krieger, from which plaintiff derived his taxable income, the cost of goods sold was deducted from total gross sales, the balance remaining representing gross profit from sales; that in deter-
mining the cost of goods sold, the purchases made during the
4 year were added to the amount of the inventory as at December 31, 1918, and the amount of the inventory at December 31, 1919, was deducted from this total, the balance representing the cost of goods sold during the calendar year 1919; that in valuing both the inventory at December 31, 1918, and the inventory at December 31, 1919, items were, except as hereinafter stated, priced at cost or market, whichever was lower, in accordance with a method of valuation prescribed by the Treasury Department in article 1582 of regulation 45; that said partnership overestimated the demand for seasonable goods during 1919, consisting of goods in special designs, prints, patterns, and weaves; at December 31, 1919, said partnership had large quantities of such goods on hand, which were entirely out of style at that time; that at December 31, 1919, there was no market whatever for such goods, at any price; that said firm was unable to value such goods at market, because there was no market for them, and for that reason priced them at cost for the purposes of its inventory; that the original valuation of said goods at cost was $387,282.61; that while said goods were out of style and there was no market for them because there

was no demand, a fair valuation of said goods at December 31, 1919, based upon the prices at which they were offered to the trade by said firm in January, 1920, but found no buyers, was $229,229.46; that by reason of the overvaluation of the inventory of said firm as at December 31, 1919, its gross income and net income for the calendar year 1919 was overstated in the amount of $158,053.15.

Eighth. That the distributive shares of plaintiff in the net income of said firm of Michel & Krieger was 50 per cent thereof; that by reason of the overstatement of net income of said firm,
5 as above alleged, plaintiff erroneously reported as income and paid tax on the sum of $79,026.58; that without including said sum in plaintiff's net income, plaintiff was subject to an income tax of $177.77 for the calendar year 1919.

Ninth. That the difference between said sum of $23,819.40 and $177.77, to wit: $23,641.63, was erroneously assessed against and collected by defendant from plaintiff as income tax for the calendar year 1919; that no part of said sum of $23,641.63, the subject of this action, has been repaid to plaintiff, although demanded.

Tenth. That this is a suit of a civil nature which arises under the Constitution and laws of the United States of America, and is provided for by section 24 of the Judicial Code, as amended by section 1122, subdivision (c) of the revenue act of 1926.

Eleventh. That by reason of the premises, there is now due and owing from the defendant to the plaintiff the sum of $23,641.63, with interest thereon at the rate of 6 per centum per annum as follows: On $5,910.41, from March 15, 1920; on $5,910.41, from June 15, 1920; on $5,910.41, from September 15, 1920; and on $5,910.40, from December 15, 1920.

Twelfth. That plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted, or given encouragement to its enemies, or aided in rebellion against the Government; that plaintiff is the sole owner of the claim set forth herein and has not assigned the same or any part thereof.

6 Wherefore, plaintiff demands judgment against defendant for the sum of $23,641.63, together with interest at the rate of 6 per centum per annum, as follows: On $5,910.41, from March 15, 1920; on $5,910.41, from June 15, 1920; on $5,910.41, from September 15, 1920; and on $5,910.40, from December 15, 1920; and for costs and disbursements of this action.

THEODERE MICHEL,
By (Sgd.) DONALD HORNE,
and
(Sgd.) MORTIMER J. WOHL,
Attorneys for Plaintiff.

[*Duly sworn to by Theodore Michel; jurat omitted in printing.*]

7 In United States District Court

[Title omitted.]

Notice of motion to dismiss

SIR: Please take notice that upon the complaint herein the undersigned will move this court at a term thereof for the hearing of motions to be held in and for the southern district of New York at the courthouse, room 235, in the old post office building, Park Row & Broadway, Borough of Manhattan, city of New York, on the 15th day of January, 1929, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein on the ground that it appears on the face of the complaint that it does not state facts sufficient to constitute a cause of action and for such other relief as may be proper.

Dated, New York, N. Y., January 10, 1929.

Yours, etc.,

CHARLES H. TUTTLE,
United States Attorney for the
Southern District of New York,
Attorney for Defendant.

United States Courts and Post Office Building, Borough of Manhattan, city of New York.

To DONALD HORNE,
120 Broadway, Borough of Manhattan, City of New York,
Attorney for Plaintiff.

8 In United States District Court

[Title omitted.]

Order granting motion to dismiss

Jan. 19, 1929

A motion having been duly made herein for an order dismissing the complaint on the ground that it appears on the face of the complaint that it does not state facts sufficient to constitute a cause of action, and for such other relief as may be proper, and the said motion having come on to be heard at a term of this court for the hearing of motions, held in and for the southern district of New York, at the courthouse, room 235, old post office building, Borough of Manhattan, city of New York, on the 15th day of January, 1929.

Now, after hearing Donald Horne, Esq., attorney for the
9 plaintiff, in opposition to said motion, and Leon E. Spencer, Esq., assistant United States attorney, for defendant, in support of said motion, and due deliberation having been had, it is hereby

Ordered that the motion to dismiss the complaint be and the same hereby is granted, and that judgment be entered dismissing the complaint, with costs.

T. D. THACHER,
U. S. D. J.

10 IN UNITED STATES DISTRICT COURT

No. L 43/211

THEODORE MICHEL, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Judgment

The defendant having moved for an order dismissing the complaint herein upon the ground that said complaint failed to state facts sufficient to constitute a cause of action and said motion by order of January 21st, 1929, having been duly granted with directions accordingly.

Now, on motion of Charles H. Tuttle, United States attorney for the southern district of New York, it is

Ordered, adjudged, and decreed that the complaint herein be, and it hereby is, dismissed and that defendant, United States of America, have judgment against the plaintiff, Theodore Michel, in the sum of $20.00, its costs as taxed.

ALEX. GILCHRIST, JR., *Clerk.*

11 In the United States District Court

[Title omitted.]

Assignment of errors

And now comes Theodore Michel, plaintiff above named, by his attorney, Donald Horne, and makes and files the following assignment of errors, and says that the judgment entered in this action on the 29th day of January, 1929, is in error and unjust for the following reasons:

1. That the United States District Court for the Southern District of New York erred in holding and adjudging that the complaint does not state facts sufficient to constitute a cause of action;

2. That the United States District Court for the Southern District of New York erred in granting the defendant's motion to dismiss the complaint herein and in directing the entry of judgment in favor of the defendant and against the plaintiff, dismissing the complaint on the merits;

3. That the United States District Court for the Southern District of New York erred in entering judgment dated January 29, 1929, in favor of the defendant and against the plaintiff, and dismissing the complaint on the merits.

12 Wherefore, plaintiff prays that the said judgment of the United States District Court for the Southern District of New York be reversed, and that this cause be remanded to the said district court for further proceedings.

New York, April 17, 1929.

DONALD HORNE,
Attorney for Plaintiff-Appellant,
120 Broadway, New York.

13 In United States District Court

[Title omitted.]

Notice and order allowing appeal

The above-named plaintiff, Theodore Michel, conceiving himself aggrieved by the judgment entered on January 29, 1929, in the above-entitled proceeding, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit, and he prays that his appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

New York, April 17, 1929.

DONALD HORNE,
Attorney for Plaintiff-Appellant,
120 Broadway, New York.

And now, to wit, on April 18th, 1929; it is
Ordered, that the appeal be allowed as prayed for.

JNO. C. KNOX,
United States District Judge for the
Southern District of New York.

14 [Citation in usual form omitted in printing.]

15 In United States District Court

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said district court in the above-entitled matter as agreed on by the parties.

Dated, July 25, 1929.

DONALD HORNE,
Attorney for Plaintiff-Appellant.
CHAS. H. TUTTLE,
Attorney for Defendant-Respondent,
U. S. Attorney.

16 [Clerk's certificate to foregoing transcript omitted in printing.]

17 In United States Circuit Court of Appeals, for the Second Circuit

Nos. 141, 142. October Term, 1929

Argued December 11, 1929. Decided January 6, 1930

THEODORE MICHEL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

LOUIS KRIEGER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Southern District of New York.

Before MANTON, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

Opinion

Jan. 6, 1930

From judgments dismissing the complaints in each of the above cases on the ground that they stated no cause of action, the plaintiffs have appealed. Reversed.

The plaintiffs in the foregoing actions were partners. They seek a refund of income taxes and allege that the partnership income of the distributive shares on which they were taxed was erroneously determined because of overvaluation of closing inventory.

In the first action the complaint alleges that the plaintiff Michel filed an income tax return for the calendar year 1919 with the collector of internal revenue for the second district of New York, on March 15, 1920, and that the tax shown to be due thereon was paid in four installments ending December 15, 1920; that on February 7, 1924, Michel filed a claim for a refund of a part of the tax, which was rejected by the commissioner on September 2, 1925; that Michel brought action to recover the tax subsequent to September 26, 1928. The commissioner, on August 17, 1925, advised Michel by letter that his claim for refund would be rejected and that the rejection would officially appear on the next schedule to be approved by him, but the commissioner never notified Michel that his claim had been rejected, or the date of the rejection, until June 27, 1928, when he notified him by letter that he had rejected the claim on September 2, 1925.

In the second action the complaint alleges that the plaintiff Krieger filed an income tax return for the calendar year 1919 with the collector of internal revenue for the fifth district of New Jersey,

on March 15, 1920, and that the tax shown to be due thereon was paid in four installments ending December 15, 1920; that on September 15, 1924, Krieger filed a claim for a refund of a portion of the tax, which was rejected by the commissioner on April 20, 1925; that Krieger brought action to recover the tax subsequent to September 26, 1928. The commissioner on April 2, 1925, advised Krieger by letter that his claim for refund would be rejected and that the rejection would officially appear on the next schedule to be approved by him, but the commissioner never notified Krieger that his
18 claim had been rejected or of the date of the rejection until June 27, 1928, when he notified him by letter that he had rejected the claim on April 20, 1925.

Thus in Michel's case the tax was paid in 1920 and the rejection of his claim occurred on September 2, 1925, but he was not notified of the rejection until June 27, 1928. In Krieger's case the tax was paid in 1920 and the rejection of his claim occurred on April 20, 1925, but he was not notified of the rejection until June 27, 1928. In both cases action to recover taxes was brought more than five years after the taxes were paid and more than two years after rejection of the claim, but within two years after notification that the claim had been rejected.

Upon the foregoing facts appearing in the complaints of Michel and Krieger, respectively, the trial judge held that each cause of action was barred by the statute of limitations, and granted judgments for the Government dismissing the complaints.

The statute of limitations which must be construed is section 3226 of the Revised Statutes, as amended by section 1113(a) of the revenue act of 1926 (26 U. S. C. A. § 156). The amended section, so far as relevant, reads as follows:

"Section 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The commissioner shall within 90 days after any such disalowance notify the taxpayer thereof by mail."

Donald Horne, of New York City, for plaintiffs-appellants.

Charles H. Tuttle, U. S. Atty., of New York City (Leon E. Spencer, Asst. U. S. Atty., of New York City, of counsel), for the United States.

AUGUSTUS N. HAND, Circuit Judge (after stating the facts as above): The question before us is the effect to be given to the provision of the statute that the Commissioner of Internal Revenue shall within ninety days after the disallowance of a claim to refund taxes notify the taxpayer thereof by mail.

If the words directing notice amount to no more than a regulation for the promotion of efficient administration and are not a requirement for the protection of the taxpayer, then the claim of each plaintiff is barred because more than two years have elapsed since his claim was rejected. But it is hard to suppose that the provision for notice was not primarily intended to warn the taxpayer of the rejection of his claim and of the running of the statute. The schedule of assessments which the commissioner approves is not a record open to the public, but is an interdepartmental document, and the taxpayer apparently has no authoritative information as to the decision of the commissioner except the prescribed notice by mail. But notice of the commissioner's action is required by all the necessities of the case. While there is a general provision in the amended section 3226, supra, giving the taxpayer five years after payment of his tax within which to sue for the recovery of an overpayment, few persons wish to go to the trouble and expense of a lawsuit where relief may come through departmental action, especially when they are obliged to file refunding applications in all cases as a preliminary requisite. It was doubtless with this human element in view that the clause was inserted in the section as finally amended, allowing a special period within which to sue after a disallowance of the taxpayer's claim, and requiring notice of such disallowance.

Under the rule laid down by the Supreme Court in French v. Edwards, 13 Wall. 506, 511, 20 L. Ed. 702, the provision in section 3226 for notice to the taxpayer would seem to be mandatory. Justice Field there explained the principle of statutory construction as follows:

19 "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested can not be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done

will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

In the present case the clause prescribing notice was intended for the protection of the citizen, and the statute did not begin to run until notice was given. It is said that the letters from the commissioner advising the plaintiffs here that their claims "would be rejected" were sufficient notices to comply with the law. The statute, however, prescribes a notice "after" the disallowance. The word "after" is not merely technical, but seems to us to go to the essence. It requires notice of the final decision, and does not leave the taxpayer to discover when that decision has been made with no aid but the prophecy of the commissioner—a prophecy subject to a possible change of the latter's opinion. The rejection appearing on the schedule approved by the commissioner, and not the letter forecasting his action, represented his final decision as a matter of law. (Girard Trust Co. v. United States, 270 U. S. 163, 46 S. Ct. 229, 70 L. Ed. 524.) It is the rendering of this final decision of which notice had to be given.

In Mahoning Coal R. Co. v. United States (D. C.), 28 F. (2d) 917, Judge Paul Jones held that the statute of limitations we are considering had not run where no notice of the disallowance of the taxpayer's claim had been given, even though a period of more than two years subsequent to the date of the decision by the commissioner had elapsed.

It can not be denied that difficulties arise in treating the notice clause as mandatory. The section requires suit to be "begun within two years after the disallowance," and then prescribes a notice by mail "within 90 days after * * * disallowance." If the notice is given within the ninety days, the matter is simple; but, if the commissioner renders his decision and then waits for one year and eleven months before giving notice, or if notice is not given for more than two years after a decision is rendered, or is not given at all, when, if ever, would the statute begin to run? A literal reading of the act would remove the bar wherever the commissioner has not given notice within the ninety days; yet that would seem an unfortunate result. But we need go no further at present than to say that the commissioner gave no notice of his decision until about two months before the above actions were brought, and that the causes of action were not barred then even if they would ever become barred when a notice had not been mailed within ninety days after the decision of the commissioner. The provisions of the statute, in our opinion, are irreconcilable unless it be held to require both a decision disallowing the taxpayer's claim and a notice to the taxpayer by mail of such disallowance before the time shall begin to run. By no other construction can its mandatory provision be given effect, and its various provisions be made congruous.

It is probably true that the taxpayers here were careless and might have found out long before they were given formal notices that their claims had been rejected, but the statute does not bar

the rights of taxpayers for failure to exercise due diligence, but only after such notice is given and such time has elapsed as the act prescribes.

Judgment in each case reversed, with leave to defendant to answer.

CHASE, *Circuit Judge*, dissents without opinion.

20 In United States Circuit Court of Appeals, Second Circuit

Jan. 13, 1930

THEODORE MICHEL, PLAINTIFF-APPELLANT
v.
UNITED STATES, DEFENDANT-APPELLEE

Decree

Filed Jan. 14, 1930

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said district could be, and it hereby is, reversed with leave to defendant to answer.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

WM. PARKIN, *Clerk*.

21 [File endorsement omitted.]

22 [Clerk's certificate to foregoing transcript omitted in printing.]

23 In United States District Court, Southern District of New York

LOUIS KRIEGER, PLAINTIFF
against
THE UNITED STATES OF AMERICA, DEFENDANT } No. L. 43/210

Complaint

Plaintiff, by Donald Horne, his attorney, for his complaint against the United States of America, respectfully shows and alleges:

First. That at all times herein mentioned plaintiff was and now is a citizen of the United States and a resident of the city of Newark, county of Essex, State of New Jersey; that during the year 1919 plaintiff was a member of the co-partnership of Michel & Krieger, composed of Theodore Michel and Louis Krieger, plaintiff herein, which said co-partnership was engaged in the business of

manufacturing, converting, and dealing in silks, with its principal office and place of business at No. 225 Fifth Avenue, in the Borough of Manhattan, city of New York, county of New York, State of New York.

Second. That during the year 1920, and from June 1, 1914,
24 to May 31, 1921, Charles V. Duffy was the collector of internal revenue for the fifth district of New Jersey; that since May 31, 1921, said Charles V. Duffy has not been in office as collector of internal revenue.

Third. That on March 15, 1920, plaintiff duly filed with said Charles V. Duffy, as collector of internal revenue, his income tax return for the calendar year 1919, and paid the income tax thereon shown to be due, in four installments, as provided by law, as follows: On March 15, 1920, $6,000.00; on June 15, 1920 $4,500.00; on September 15, 1920, $4,500.00; on December 15, 1920, $4,993.47, a total of $19,993.47.

Fourth. That on September 15, 1924, plaintiff filed with the collector of internal revenue for the fifth district of New Jersey his claim for refund of $19,993.47, stating therein that his income for 1919 had been overstated in the amount of $79,026.57; that said overstatement was due to overvaluation of the closing inventory in the return of income of Michel & Krieger, said copartnership; that on April 2, 1925, the Commissioner of Internal Revenue advised plaintiff by letter that said claim for refund would be rejected, and that this rejection would officially appear on the next schedule to be approved by him; that the Commissioner of Internal Revenue never notified plaintiff that the claim had been rejected or the date of such rejection until June 27, 1928; that on said last-mentioned date the Commissioner of Internal Revenue notified plaintiff by letter that he rejected the claim on April 20, 1925.

Fifth. That the schedule on which the rejection officially appeared,
referred to in the commissioner's letters to plaintiff dated
25 April 2, 1925, and June 27, 1928, was a list of overassessments, for transmission to the collector of internal revenue, and not furnished to or available to plaintiff; that plaintiff had no notice that said schedule had been approved by the Commissioner of Internal Revenue until June 27, 1928, and that plaintiff received no notice of the rejection of his claim or the date thereof until June 27, 1928.

Sixth. That section 3226 of the Revised Statutes of the United States, as amended by section 1014 of the revenue act of 1924, and reenacted without change by section 1113 of the revenue act of 1926, provides that a taxpayer may begin a suit for recovery of internal revenue taxes alleged to have been erroneously or illegally assessed or collected at any time within two years after the disallowance of the part of a claim for refund to which such suit relates, and that the Commissioner of Internal Revenue shall within ninety days after any such disallowance notify the taxpayer thereof by mail; that the Commissioner of Internal Revenue disallowed the part of plaintiff's

claim to which this suit relates on April 20, 1925, and did not notify plaintiff thereof by mail or otherwise within ninety days after such disallowance, or until June 27, 1928, more than two years after such disallowance.

Seventh. That in computing the gross income of the partnership of Michel & Krieger, from which plaintiff derived his taxable income, the cost of goods sold was deducted from total gross sales, the balance remaining representing gross profit from sales; that in determining the cost of goods sold, the purchases made during the year were added to the amount of the inventory as at December 31, 1918, and
26 the amount of the inventory at December 31, 1919, was deducted from the total, the balance representing the cost of goods sold during the calendar year 1919; that in valuing both the inventory at December 31, 1918, and the inventory at December 31, 1919, items were, except as hereinafter stated, priced at cost or market, whichever was lower, in accordance with a method of valuation prescribed by the Treasury Department in Article 1582 of Regulation 45; that said partnership overestimated the demand for seasonable goods during 1919, consisting of goods in special designs, prints, patterns, and weaves; at December 31, 1919, said partnership had large quantities of such goods on hand, which were entirely out of style at that time; that at December 31, 1919, there was no market whatever for such goods, at any price; that said firm was unable to value such goods at market, because there was no market for them, and for that reason priced them at cost for the purposes of its inventory; that the original valuation of said goods at cost was $387,282.61; that while said goods were out of style, and there was no market for them because there was no demand, a fair valuation of said goods at December 31, 1919, based upon the prices at which they were offered to the trade by said firm in January, 1920, but found no buyers, was $229,229.46; that by reason of the overvaluation of the inventory of said firm as at December 31, 1919, in gross income and net income for the calendar year 1919 was overstated in the amount of $158,053.15.

Eighth. That the distributive share of plaintiff in the net income of said firm of Michel & Krieger was 50 per cent thereof; that by reason of the overstatement of net income of said firm, as
27 above alleged, plaintiff erroneously reported as income and paid tax on the sum of $79,026.58; that without including said sum in plaintiff's net income, plaintiff was subject to no income tax for the calendar year 1919.

Ninth. That said sum of $19,993.47 was erroneously assessed against and collected by defendant from plaintiff as income tax for the calendar year 1919; that no part of said sum of $19,993.47, the subject of this action, has been repaid to plaintiff, although demanded.

Tenth. That this is a suit of a civil nature which arises under the Constitution and laws of the United States of America, and is provided for by section 24 of the Judicial Code, as amended by section 1122, subdivision (c) of the revenue act of 1926.

Eleventh. That, by reason of the premises, there is now due and owing from the defendant to the plaintiff the sum of $19,993.47, with interest thereon at the rate of 6 per centum per annum, as follows: On $6,000.00, from March 15, 1920; on $4,500.00, from June 15, 1920; on $4,500, from September 15, 1920; and on $4,993.47, from December 15, 1920.

Twelfth. That plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted, or given encouragement to its enemies, or aided in rebellion against the Government; that plaintiff is the sole owner of the claim set forth herein and has not assigned the same or any part thereof.

Wherefore, plaintiff demands judgment against defendant
28 for the sum of $19,993.47, together with interest at the rate of 6 per centum per annum, as follows: On $6,000.00, from March 15, 1920; on $4,500.00, from June 15, 1920; on $4,500.00, from September 15, 1920; and on $4,993.47, from December 15, 1920; and for costs and disbursements of this action.

LOUIS KRIEGER,
By (Sgd.) DONALD HORNE,
and
(Sgd.) MORTIMER J. WOHL,
Attorneys for Plaintiff.

[*Duly sworn to by Louis Krieger; jurat omitted in printing.*]

29 In United States District Court

[Title omitted.]

Notice of motion to dismiss

SIR: Please take notice that upon the complaint herein the undersigned will move this court at a term thereof for the hearing of motions to be held in and for the southern district of New York at the courthouse, room 235, in the old post office building, Park Row & Broadway, Borough of Manhattan, city of New York, on the 15th day of January, 1929, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein on the ground that it appears on the face of the complaint that it does not state facts sufficient to
30 constitute a cause of action and for such other relief as may be proper.

Dated: New York, N. Y., January 10, 1929.

Yours, etc.,

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York, Attorney for Defendant.

United States Courts and Post Office Building, Borough of Manhattan, city of New York.

To DONALD HORNE,
120 Broadway, Borough of Manhattan, City of New York, Attorney for Plaintiff.

31 In United States District Court

[Title omitted.]

Order granting motion to dismiss

Jan. 19, 1929

A motion having been duly made herein for an order dismissing the complaint on the ground that it appears on the face of the complaint that it does not state facts sufficient to constitute a cause of action, and for such other relief as may be proper, and the said motion having come on to be heard at a term of this court, for the hearing of motions held in and for the southern district of New York, at the courthouse, room 235, old post office building, Borough of Manhattan, city of New York, on the 15th day of January, 1929.

Now, after hearing Danold Horne, Esq., attorney for the plaintiff, in opposition to said motion, and Leon E. Spencer, Esq., as-
32 sistant United States attorney, attorney for defendant, in support of said motion, and due deliberation having been had, it is hereby

Ordered that the motion to dismiss the complaint be, and the same hereby is, granted, and that judgment be entered dismissing the complaint, with costs.

T. D. THACHER,
U. S. D. J.

In the United States District Court

LOUIS KRIEGER, PLAINTIFF
vs.
UNITED STATES OF AMERICA, DEFENDANT
} No. L. 43, 210

Judgment

The defendant having moved for an order dismissing the complaint herein upon the ground that said complaint failed to state facts sufficient to constitute a cause of action and said motion by order of January 21st, 1929, having been duly granted with directions accordingly,

Now, on motion of Charles H. Tuttle, United States attorney for the southern district of New York, it is

33 Ordered, adjudged, and decreed that the complaint herein be, and it hereby is, dismissed and that defendant, United States of America, have judgment against the plaintiff, Louis Krieger, in the sum of $20.00, its costs as taxed.

ALEX. GILCHRIST, JR., *Clerk.*

In United States District Court

[Title omitted.]

Assignment of Errors

And now comes Louis Krieger, plaintiff above named, by his attorney, Donald Horne, and makes and files the following assignment of errors, and says that the judgment entered in this action on the 29th day of January, 1929, is in error and unjust for the following reasons:

1. That the United States District Court for the Southern District of New York erred in holding and adjudging that the complaint does not state facts sufficient to constitute a cause of action;

34 2. That the United States District Court for the Southern District of New York erred in granting the defendant's motion to dismiss the complaint herein and in directing the entry of judgment in favor of the defendant and against the plaintiff dismissing the complaint on the merits;

3. That the United States District Court for the Southern District of New York erred in entering judgment dated January 29, 1929, in favor of the defendant and against the plaintiff and dismissing the complaint on the merits.

Wherefore plaintiff prays that the said judgment of the United States District Court for the Southern District of New York be reversed and that this cause be remanded to the said district court for further proceedings.

New York, April 17, 1929.

DONALD HORNE,
Attorney for Plaintiff-Appellant,
120 Broadway, New York.

35 In United States District Court

[Title omitted.]

Notice and order allowing appeal

The above-named plaintiff, Louis Krieger, conceiving himself aggrieved by the judgment entered on January 29, 1929, in the above-entitled proceeding, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit, and he prays that his appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

New York, April 17, 1929.

DONALD HORNE,
Attorney for Plaintiff-Appellant,
120 Broadway, New York.

And now, to wit, on April 18th, 1929, it is
Ordered that the appeal be allowed as prayed for.

JNO. C. KNOX,
United States District Judge for the
Southern District of New York.

36 [Citation in usual form omitted in printing.]

37 In United States District Court

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said district court in the above-entitled matter as agreed on by the parties.

Dated July 25, 1929.

DONALD HORNE,
Attorney for Plaintiff-Appellant.
CHAS. H. TUTTLE,
Attorney for Defendant-Respondent,
U. S. Attorney.

38 [Clerk's certificate to foregoing transcript omitted in printing.]

39 In United States Circuit Court of Appeals for the Second Circuit

Nos. 141, 142—October Term, 1929

Argued December 11, 1929. Decided January 6, 1930

THEODORE MICHEL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

LOUIS KRIEGER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Southern District of New York.

Before MANTON, AUGUSTUS N. HAND, and CHASE, Circuit Judges.

Opinion

January 6, 1930

From judgments dismissing the complaints in each of the above cases on the ground that they stated no cause of action, the plaintiffs have appealed. Reversed.

The plaintiffs in the foregoing actions were partners. They seek a refund of income taxes and allege that the partnership income of the distributive shares on which they were taxed was erroneously determined because of overvaluation of closing inventory.

In the first action the complaint alleges that the plaintiff Michel filed an income-tax return for the calendar year 1919 with the collector of internal revenue for the second district of New York, on March 15, 1920, and that the tax shown to be due thereon was paid in four installments ending December 15, 1920; that on February 7, 1924, Michel filed a claim for a refund of a part of the tax, which was rejected by the commissioner on September 2, 1925; that Michel brought action to recover the tax subsequent to September 26, 1928. The commissioner, on August 17, 1925, advised Michel by letter that his claim for refund would be rejected and that the rejection would officially appear on the next schedule to be approved by him, but the commissioner never notified Michel that his claim had been rejected, or the date of the rejection, until June 27, 1928, when he notified him by letter that he had rejected the claim on September 2, 1925.

In the second action the complaint alleges that the plaintiff Krieger filed an income-tax return for the calendar year 1919 with the collector of internal revenue for the fifth district of New Jersey, on March 15, 1920, and that the tax shown to be due thereon was paid in four installments ending December 15, 1920; that on September 15, 1924, Krieger filed a claim for a refund of a portion of the tax, which was rejected by the commissioner on April 20, 1925; that Krieger brought action to recover the tax subsequent to September 26, 1928. The commissioner on April 2, 1925, advised Krieger by letter that his claim for refund would be rejected and that the rejection would officially appear on the next schedule to be approved by him, but the commissioner never notified Krieger that his
40 claim had been rejected or of the date of the rejection until June 27, 1928, when he notified him by letter that he had rejected the claim on April 20, 1925.

Thus in Michel's case the tax was paid in 1920 and the rejection of his claim occurred on September 2, 1925, but he was not notified of the rejection until June 27, 1928. In Krieger's case the tax was paid in 1920 and the rejection of his claim occurred on April 20, 1925, but he was not notified of the rejection until June 27, 1928. In both cases action to recover taxes was brought more than five years after the taxes were paid and more than two years after rejection of the claim, but within two years after notification that the claim had been rejected.

Upon the foregoing facts appearing in the complaints of Michel and Krieger, respectively, the trial judge held that each cause of action was barred by the statute of limitations, and granted judgments for the Government, dismissing the complaints.

The statute of limitations which must be construed is section 3226 of the Revised Statutes, as amended by section 1113 (a) of the revenue act of 1926 (26 U. S. C. A. § 156). The amended section, so far as relevant, reads as follows:

"Section 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The commissioner shall, within 90 days after any such disallowance, notify the taxpayer thereof by mail."

Donald Horne, of New York City, for plaintiffs-appellants.

Charles H. Tuttle, U. S. Atty., of New York City (Leon E. Spencer, Asst. U. S. Atty., of New York City, of counsel), for the United States.

AUGUSTUS N. HAND, Circuit Judge (after stating the facts as above): The question before us is the effect to be given to the provision of the statute that the Commissioner of Internal Revenue shall within ninety days after the disallowance of a claim to refund taxes notify the taxpayer thereof by mail.

If the words directing notice amount to no more than a regulation for the promotion of efficient administration and are not a requirement for the protection of the taxpayer, then the claim of each plaintiff is barred because more than two years have elapsed since his claim was rejected. But it is hard to suppose that the provision for notice was not primarily intended to warn the taxpayer of the rejection of his claim and of the running of the statute. The schedule of assessments which the commissioner approves is not a record open to the public, but is an interdepartmental document, and the taxpayer apparently has no authoritative information as to the decision of the commissioner except the prescribed notice by mail. But notice of the commissioner's action is required by all the necessities of the case. While there is a general provision in the amended section 3226, supra, giving the taxpayer five years after payment of his tax within which to sue for the recovery of an overpayment, few persons wish to go to the trouble and expense of a lawsuit where relief may come through departmental action, especially when they are obliged to file refunding applications in all cases as a preliminary requisite. It was doubtless with this human element in view that the clause was inserted in the section as finally amended, allowing a special period within which to sue after a disallowance of the taxpayer's claim, and requiring notice of such disallowance.

Under the rule laid down by the Supreme Court in French v. Edwards (13 Wall. 506, 511, 20 L. Ed. 702) the provision in section 3226 for notice to the taxpayer would seem to be mandatory. Justice Field there explained the principle of statutory construction as follows:

41 "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

In the present case the clause prescribing notice was intended for the protection of the citizen, and the statute did not begin to run until notice was given. It is said that the letters from the commissioner advising the plaintiffs here that their claims "would be rejected" were sufficient notices to comply with the law. The statute, however, prescribes a notice "after" the disallowance. The word "after" is not merely technical, but seems to us to go to the essence. It requires notice of the final decision, and does not leave the taxpayer to discover when that decision has been made with no aid but the prophecy of the commissioner—a prophecy subject to a possible change of the latter's opinion. The rejection appearing on the schedule approved by the commissioner, and not the letter forecasting his action, represented his final decision as a matter of law. (Girard Trust Co. v. United States, 270 U. S. 163, 46 S. Ct. 229, 70 L. Ed. 524.) It is the rendering of this final decision of which notice had to be given.

In Mahoning Coal R. Co. v. United States (D. C.) 28 F. (2d) 917, Judge Paul Jones held that the statute of limitations we are considering had not run where no notice of the disallowance of the taxpayer's claim had been given, even though a period of more than two years subsequent to the date of the decision by the commissioner had elapsed.

It cannot be denied that difficulties arise in treating the notice clause as mandatory. The section requires suit to be "begun within two years after the disallowance," and then prescribes a notice by mail "within 90 days after * * * disallowance." If the notice is given within the ninety days, the matter is simple; but, if the commissioner renders his decision and then waits for one year and eleven months before giving notice, or if notice is not given for more

than two years after a decision is rendered, or is not given at all, when, if ever, would the statute begin to run? A literal reading of the act would remove the bar wherever the commissioner has not given notice within the ninety days; yet that would seem an unfortunate result. But we need go no further at present than to say that the commissioner gave no notice of his decision until about two months before the above actions were brought, and that the causes of action were not barred then even if they would ever become barred when a notice had not been mailed within ninety days after the decision of the commissioner. The provisions of the statute, in our opinion, are irreconcilable unless it be held to require both a decision disallowing the taxpayer's claim and a notice to the taxpayer by mail of such disallowance before the time shall begin to run. By no other construction can its mandatory provision be given effect and its various provisions be made congruous.

It is probably true that the taxpayers here were careless and might have found out long before they were given formal notices that their claims had been rejected, but the statute does not bar the rights of taxpayers for failure to exercise due diligence but only after such notice is given and such time has elapsed as the act prescribes.

Judgment in each case reversed, with leave to defendant to answer.

CHASE, Circuit Judge, dissents, without opinion.

42 In United States Circuit Court of Appeals, Second Circuit

Jan. 13, 1930

LOUIS KRIEGER, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Decree

Filed Jan. 14, 1930

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said district court be, and it hereby is, reversed, with leave to defendant to answer.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

WILLIAM PARKIN, *Clerk.*

43 [File endorsement omitted.]

44 [Clerk's certificate to foregoing transcript omitted in printing.]

45 Supreme Court of the United States

THE UNITED STATES OF AMERICA, PETITIONER
vs.
THEODORE MICHEL

Order allowing certiorari

Filed May 19, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

46 Supreme Court of the United States

THE UNITED STATES OF AMERICA, PETITIONER
vs.
LOUIS KRIEGER

Order allowing certiorari

Filed May 19, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File Nos. 34943, 34944. U. S. Circuit Court of Appeals, Second Circuit. Term No. 812. The United States of America, petitioner, vs. Theodore Michel. Term No. 813. The United States of America, petitioner, vs. Louis Krieger. Petition for writs of certiorari and exhibits thereto. Filed April 12, 1930. File Nos. 34943, 34944.

U. S. GOVERNMENT PRINTING OFFICE: 1930

